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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., THE MAGAZINE PUBLISHERS ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANT'S BRIEF

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Statement

The American Booksellers Association, Inc., The National Association of College Stores, Inc., and the Magazine Publishers Association, Inc. (Collectively referred to herein as "Amici") file this brief in support of appellant's brief, as amici curiae, pursuant to the consent of the District Attorney representing appellee, (Appendix—Exhibit "1") the consent of the appellant (Appendix—Exhibit "2") and the decision of the Supreme Court of the United States (Appendix—Exhibit "3").

The appeal is from the affirmance by the Supreme Court of the State of Georgia of the conviction of Billy Jenkins for exhibiting the motion picture "Carnal Knowledge" in a movie theatre in the City of Albany, Georgia.

Interest of Amici

American Booksellers Association is a trade association organized under the laws of the State of New York. Its regular membership consists of 3,968 booksellers, including large chain operations. It represents the vast majority of large American booksellers and approximately half of all American booksellers, including private book stores, department store book departments and university book stores. Its members range from small stores which sell approximately 1,000 titles per year, to the largest, some of which sell more than 40,000 titles per year.

The National Association of College Stores, Inc. is an association composed of 2,250 stores serving more than seven million college students and faculty. Universities and colleges own 1,700 of these stores.

The Magazine Publishers Association, Inc. is a national trade association, founded in 1919 as a New York corporation, whose membership is composed of more than 134 publishers representing more than 451 magazines and other periodical publications with a combined readership of more than 89% of the adults in the United States.

None of the Amici at any time has had any involvement with the creation, production, distribution or exhibition of the film "Carnal Knowledge". None is in any way connected with the motion picture industry.

The Amici are particularly concerned with the affects the conviction below and the opinion of the Supreme Court of the State of Georgia will have on First and Fourteenth Amendment rights of all persons and most particularly on book and magazine publishers; distributors and vendors.

We are equally concerned with what we consider to be unconstitutional interpretations derived by the Supreme

Court of the State of Georgia from *Miller* v. *California*, — U.S. —— 93 S. Ct. 2607 (1973) and its companion cases.

It is the position of Amici that the Miller guidelines must be clarified or revised in order to remove the cloud of confusion which has descended over the entire area of obscenity legislatively and decisionally since *Miller* and its companion cases were decided on June 21, 1973.[1] If national book and magazine publishers, distributors and vendors can not predict their circulation, printing runs, inventory requirements in each state, and they can not determine advertising rates (magazines), printing schedules, printing runs, inventory projections or many of the other essential business factors which are predicated upon projected circulation or distribution.

This threat presents a clear and present economic danger to the continued existence of many companies within each industry.

In *Miller* the majority opinion stated "the dissenting Justices sounded the alarm of repression . . . these doleful anticipations assume that the Court cannot distinguish commerce in ideas protected by the First Amendment from commercial exploitation of obscene material." Regretably, a trend toward community censorship, book burning, book banning and other forms of official and indirect censorship, has manifested itself in numerous ways since the decision of *Miller* and its companion cases. We have set forth below a number of such incidents occurring throughout the nation, as quoted in newspaper articles:

(a) "Various Groups Attacking Modern School Textbooks.

[1] The essential difference between the majority and minority opinions in the decision below was a disagreement over interpretation of the Miller Guidelines.

. . . "Modern school textbooks are under increasing attack these days . . .

"Mrs. Mel Gabler, of Longview, Tex., who first began protesting textbooks in Texas 13 years ago and has now formed a firm that works nationwide, contends a sociology book proposed by Prentice-Hall, Inc. conditioned young people toward 'barnyard morals.'

"Mrs. Gabler also sharply criticized high school psychology books proposed by Prentice-Hall, Inc. drafting 18 pages of written objections claiming one book encouraged homosexuality. . . .

"The publisher responded to her lengthy objections in one paragraph, saying that Mrs. Gabler's attack on the book was so broad that it would, in effect, protest the entire study of psychology in high schools." [1]

(b) "Dakota town Dumfounded at Criticism of Book Burning by Order of the School Board.

". . .

"At a public school Board meeting last week the books were attacked as being unsuitable for 15-year-old minds. After reading the book in whole or in part the board members unanimously ordered the copies of 'Slaughter House Five' destroyed. According to school superintendent Dale Fuhrman, virtually the only school official who will talk to newsmen 'Deliverance' and an anthology of stories by William Faulkner, Ernest Hemingway and John Steinbeck, which Mr. Severy had

[1] Belleville [Illinois] News-Democrat, 11/2/73.

also assigned were to be investigated and, if found unsuitable, also destroyed." [3]

(c) "Smut Law Even Bans Baby Bottoms.

". . .

"Police Chief Ed Rein said Monday that even baby powder advertisements depicting naked infants probably are illegal under the strict new ordinance passed unanimously by the City Council [New Baltimore] on October 23.

"'I believe they show baby buttocks he said with a grin.'

"Buttocks are among the things which the new law specifically identifies as offensive. . . ." [4]

(d) "Teacher Charged with Obscenity."

"The ambiguity feared by detractors of the recent Supreme Court ruling on obscenity became easily apparent in a McBee, South Carolina, lawsuit where a school teacher is being charged with distributing obscene materials to minors for giving a study assignment of a book which was on the school's approved list.

"The sheriff's office said some people in the rural community of less than 1,000 appeared upset by some language in the book 'Slaughter House Five' which deals with the horrors of war and the Allied's fire bombing of Dresden during World War II. . . ." [5]

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[3] New York Times, 11/16/73.

[4] Detroit Free Press, 11/6/73.

[5] Dunn, North Carolina Record, 10/29/73.

(e) Strongville book ban decried, defended.

"Lawyers for the Strongville Board of Education told U.S. District Court last week that only the board has the right to determine what books are used in the schools and any attempt to take away that right would be unconstitutional.

" . . .

"The board had banned high school use of 'Catch 22' by Joseph Heller and 'Cat's Cradle' and 'God Bless You, Mr. Rosewater' by Kurt Vonnegut, Jr. . . ." [6]

(f) "U.S. classic expurgated, school sued.

"Some students of suburban Hilliard Junior High School objected when a book of poems they bought directly from the school for $1.25 had 4 pages missing.

"After pupils were told that their two English teachers and the principal had found the pages offensive and removed them, a suit was filed in U.S. District Court here.

" . . .

"Principal Harry P. Smith said the two teachers . . . objected to analyzing four poems in Edgar Lee Master's 1915 Spoon River Anthology.

" . . .

"The poems use the words 'harlot', 'bare breast', 'free love' and 'lesbian'." [7]

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[6] Cleveland Plain Dealer, 11/4/73.

[7] Philadelphia Inquirer, 9/26/73 (Reporting Columbus, Ohio, Press Release).

(g) "Blind Man Helps Censor Rockland County Films.

"West Nyack, N.Y. Oct. 7, Several weeks ago the Town of Clarkston, in Rockland County, established a nine-member 'Obscenity Committee' to screen movies, cabaret acts and printed matter.

"A few weeks ago it selected Harry Snyder, a blind 60-year-old retired restaurateur and business man to head the committee. . . ."[8]

(h) "Flowers for Algernon Called 'Immoral.'

"Several parents of students at Elizabethtown Area High School have expressed concern about what they believe to be 'immoral' passages in a novel currently being read in a junior English class.

"The book is Daniel Keyes' 'Flowers for Algernon,' a . . . best-seller which has been televised and which was made into a film called 'Charly' several years ago.

"At least one of the concerned parents . . . has asked the school district to remove the book from the curriculum and from the shelves of the school library.

" . . .

"Board Vice President J. Samuel Parrett said he had received several telephone calls denouncing the use of 'Flowers of Algernon' and noted that he questioned the use of this type of literature in English classes.

" 'There's so much of this obscene material available that we don't have to give it to children in the schools,' he explained Tuesday. . . ."[9]

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[8] New York Times, 11/22/73.

[9] Lancaster, Pa. New Era, 10/17/73.

(i) "Henrico Library Suspends 5 Books.

"Five books, including one that is required reading for many high school students, have been removed from the shelves of all five branches of the Henrico Public Library while they are being reviewed by the library system's committee that considers controversial books.

" . . .

"The five books that have been removed for review are 'Catcher in the Rye' by J.D. Salinger, 'Summer of '42' by Herman Raucher, 'Deliverance' by James Dickey, 'A Clockwork Orange' by Anthony Burgess, and a child's book 'Story Number Three' by Eugene Ionesco, with illustrations by Phillippe Corentin.

" . . .

"Any patron who has an objection about a book on the shelves can fill out a citizen's request for reconsideration of the book, stating objections and the review is launched. . . ." [10]

(j) "U.S. Funds Anti-Smut Drive.

"A Lutheran college in California is receiving $137,625 in federal funds to assist prosecutors across the country in a crack-down against obscene films and literature.

"The project offers suggested 'trial tactics', provides model pleadings and court orders and even supplies expert witnesses to testify against de-

[10] Richmond, Virginia, Times Dispatch, 10/1/73.

fendants. The next proposal is to send briefs for anti-pornography arguments to selected judges.

". . .

"The federally funded project . . . was begun on the recommendation of a Jesuit priest, the Rev. Morton A. Hill, who helped write a scathing dissenting opinion in the 1970 report of the President's Commission on Obscenity and Pornography." [11]

(k) "Book Burning Protested.

"Eight Members of the Girl Scout human-relations Committee here protested the burning of a Scout booklet 'Commitment! Community Action.'

"The 79-page publication listed program ideas suggested for high school age Girl Scouts. Some of the suggested programs were in controversial areas—sex education, birth control and womens liberation.

"The Totem Girl Scout Council board voted last week to end support of the booklet as well as destroy remaining 'supply copies.'

"Dissenting committee members said yesterday in a letter to the board:

'The act of "book burning" of material printed at council expense and authorized for distribution by the board . . . only four months ago . . . is not an act which manifests the democratic way of life. We strongly protest this action.

". . ." [12]

[11] Washington Post, 8/29/73.

[12] Seattle Washington Times, 7/21/73.

(l) " 'Vulgar' book to get study.

"Two committees of the Bibb Board of Education got their 'homework' assignments Monday—to read 'Manchild in the Promised Land' a book a parent has complained is vulgar.

". . .

"Written by Claude Brown, the book recounts the experiences of a young black man growing up in Harlem.

"Board member Mrs. Delores Cook said parents have a right to object to any material. 'If parents want to object to Mother Goose, fine. I have heard of some pretty Freudian explanations for Mother Goose', she said." [13]

(m) "Sheriff cracks down on nudes.

"Longwood, Fla., (AP)—The Longwood police chief has declared bare skin a sin when reviewed between the covers of magazines.

" 'That type of nudity takes away from the meaning of marriage and the family.' It is a sin said Chief Wesley Dowell in announcing a crack down on sale of Playboy, Penthouse and similar magazines.

"Claiming authority to interpret obscenity under a 1968 city ordinance forbidding sale or exhibition of pornography, the Chief said the sale of such publications will be a misdemeanor.

"Dowell said he had not contacted the city council . . . and was leaning on a recent U.S. Supreme

[13] Macon, Ga., Telegraph, 7/17/73.

Court decision giving communities the authority to define obscenity.

"'If a nude body appears, I'm against it. I am just as concerned about male nudity. I am not just picking on the ladies, he added." [14]

The foregoing illustrations have been accumulated only after minimal research and have been culled only from the files of major daily newspapers throughout the nation. We respectfully submit that the illustrations cited represent only a small fraction of examples of book burning, banning, and censorship.

The "Alarm of Repression" has validly been sounded.

ARGUMENT

POINT I

The Miller standards for determining obscenity are not clear, resulting in First Amendment and Due Process violations of appellant's rights.

The heart of *Miller* v. *California*, —— U.S. ——, 93 S.Ct. 2607 (1973) is its statement of guidelines:

"The basic guidelines for the trier of fact must be:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." (citations omitted).

[14] Longwood, Fla. (AP), Coon Rapids, Iowa, News 12/9/73.

We believe such guidelines to be unclear for the reasons set forth below.

(a) ***The boundaries of the "community" which sets the standards for determining prurient appeal may not vary from locality to locality within a State.***

1. Due Process.

An essential ingredient in the Opinion of the Supreme Court of Georgia was that "The *Miller* case, supra, further held that juries can consider State or local community standards in lieu of 'national standards . . . ." Such an interpretation would appear to be incorrect and in violation of the Fourteenth Amendment which prohibits State sanction of infringements on liberty without due process of law.

The source of this disturbing interpretation by the Court below can be traced to a dictum in *Miller*, which reads:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept depiction of conduct found tolerable in Las Vegas, or New York City." (*Miller* v. *California*, —— U.S., at—93 S.Ct. at 2619).

In isolation, such dictum is susceptible of the interpretation derived by the majority of the court below. When read in the light of the standards so painstakingly set forth in *Miller* to determine "the basic guidelines", the dictum must be viewed only as an illustration in support of the proposition that the tolerance level for works appealing to prurient interest varies from locality to locality. Certainly no one could quarrel with that proposition. One could as readily postulate that the tolerance level for

obscenity in a blue collar neighborhood of one-family homes in the County of Queens would be far lower than in the Greenwich Village section of New York County, both located within the City of New York.

It is precisely the probability of such variations which makes city-wide, county-wide, town-wide, or village-wide standards unascertainable and therefore unconstitutional. When the concept of "community" standards which determine criminality becomes so difficult to ascertain that publishers, authors, book and magazine vendors, and motion picture producers, distributors and exhibitors must necessarily guess at its meaning and differ as to its applications, any legislation relying upon such concept must of necessity run afoul of the Fourteenth Amendment protection against infringement of liberty without due process of law. *Connaly* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). The opinion of the Georgia Supreme Court, which made no attempt to ascertain whether "local" means county, city, neighborhood, or whatever, only exacerbated the difficulty of constitutionally applying "local" standards.

2. First Amendment.

When a conviction, based on violation of an obscenity statute is obtained by applying "local" standards, particularly after such conviction is affirmed by a state appellate court, that conviction effectively imposes a form of self-censorship on all other potential publishers, distributors, vendors or exhibitors within the state of conviction. How many crusading publishers, distributors, vendors or exhibitors can we expect to find ready to face criminal conviction by publishing, distributing, vending or exhibiting a work held to be obscene, after learning of a judicial determination in a different locality in the state which threatens just such repercussions. In such event the self-censorship, compelled by state law, would be a censorship

affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of works, both obscene and not obscene, depending upon the "local" standard to be applied, would unconstitutionally be impeded. Cf. *Smith* v. *California*, 361 U.S. 147 (1959).

The leading lower court decision on the applicability of community standards in obscenity cases, *In re Giannini*, 69 Cal.2d 563, 72 Cal. Rptr. 655, 446 P.2d 535 (1969) cert. denied 395 U.S. 910 (1969), concluded that

> "... on balance a community comprised of the entire State of California is the more appropriate. This standard avoids administrative problems in determining the exact scope of the smaller community; whether it should be city, county, individual neighborhood within a city, or whatever. Moreover, a strong policy favors uniformity in application of state criminal law [citation omitted]; we promote this policy by assuring that application of the obscenity law in this state will be based on a uniform 'community'."

The effect of the application of "community" standards, as applied by the court below, would make for uncertainty, unpredictability and economic chaos for national publishers, distributors and booksellers so as to have a chilling effect on the publication and sale of magazines and books which even border on the controversial.

(b) ***The Miller guideline that a work must depict or describe patently offensive sexual conduct in order to fall beyond the scope of First Amendment protection should be limited to "hard core" pornography.***

1. Due Process.

This court has long held that scienter is a prerequisite to a finding of criminal violation of obscenity legislation.

Smith v. *California*, 361 U.S. 147 (1959). However, careful reflection will confirm that scienter in obscenity cases involves more than knowledge of the contents of the allegedly offending work. Of necessity it also involves a value judgment. The instant case is an illustration in point.

When seven distinguished judges of the highest court of the State of Georgia can divide 4 to 3 as to whether "Carnal Knowledge" was obscene, when the movie can be widely acclaimed[15] and named one of the ten best motion pictures of the year by many distinguished newspapers,[16] there is obviously reason to be concerned as to whether "Carnal Knowledge" described, "in a patently offensive way, sexual conduct specifically defined by the applicable state law . . ." Certainly the appellant had no way of knowing this in advance of his conviction. This is the crux of the case.

Unless the material is so blatantly hard core pornography that reasonable men could not differ as to its characterization, to sanction the conviction of a publisher, distributor, vendor or exhibitor would be to pay mere lip service to a defendant's rights to due process. Cf. *Connaly* v. *General Construction Co.*, 269 U.S. 385, 391 (1926); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

2. First Amendment.

This case crystalizes the danger that publishers, distributors and vendors of books and magazines and producers, distributors and exhibitors of motion pictures may

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[15] See the reviews cited the Justice Gunter's dissent and Saturday Review (Hollis Alpert); July 3, 1971, p. 18.

[16] Including The Oakland Tribune (Robert Dyler); The New York Times (Vincent Canby); The Nashville Tenesseean (Harry Horn); The Cleveland Plain Dealer (Emerson Batdorff); The Houston Chronicle (Jeff Millar); The Denver Post (Barry Oromison).

impose censorship upon themselves rather than risk a guess as to the application of the "patently offensive sexual conduct" test to a work which describes sexual conduct but is not hard core pornography.

Materials which describe blatantly "hard core pornography" present the least difficulty. Publishers, producers, distributors, vendors and exhibitors will suffer their greatest doubts with respect to those works which have both artistic and social merit and prurient interest appeal. If the dissemination of such works exposes the disseminators to criminal prosecution the spector of self-censorship of major works looms ahead frighteningly. The recent flurry of book banning and book burnings may be only a harbinger of the dangers still to be encountered. As Chief Justice Warren pointed out, "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Hariss*, 347 U.S. 612, 617 (1954). This court has frequently emphasized that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California*, 361 U.S. 147, 151 (1959); cf. *Roth* v. *United States*, 354 U.S. 476, 491—492 (1957); See *Rabe* v. *Washington*, 405 U.S. 313 (1972); *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676 (1968); *Winters* v. *New York*, 333 U.S. 507 (1948). We respectfully submit, in the light of the "Carnal Knowledge" decision of the Court below, that the *Miller* guidelines have already had such an inhibiting affect.

Parenthetically, it should be noted that state intrusions on First Amendment rights have been severely limited by this court in press freedom areas in connection with rights otherwise protected by state libel[17] and right of privacy laws.[18]

(c) ***In determining whether a work, "taken as a whole, lacks serious literary, artistic, political or scientific value", a national standard must apply.***

If the concept of "serious literary, artistic, political, or scientific value" is to have meaning, such concept must be determined by a national as opposed to a "community" standards. When dealing with a concept of morality (e.g., obscenity), which by definition is determined by the mores of a particular "community" at a particular time, it may be appropriate to consider only the mores of that community at that time in making such a morality judgment.

However, in determining whether a controversial work has literary, artistic, political or scientific merit, it is inconceivable that such determination be left to the judgment of a "local" community unless we are prepared to turn the clock back to the era of the Scopes trial and place the

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[17] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967) and *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971), firmly established the principle that constitutional protections for speech and press limit a state's power to award damages in a libel action brought by a public official, or public figure or any other person involved in matters of public interest, against critics of such public or non-public figures to cases involving 'actual malice.'

[18] *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), adhering to the principle established in *New York Times Co.* v. *Sullivan*, supra, held "that the constitutional protection of speech and press preclude the application of the New York statute [Section 51 of the New York Civil Rights Law dealing with right of privacy] to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."

power of determining whether a work has serious value and whether it may or may not be read, or taught, or seen, in the hands of a jury which may have inadequate training or background for making such a determination.

As noted above, "Carnal Knowledge" was widely acclaimed and received many favorable and even glowing reviews throughout the nation. If this court is to allow the serious nature of a book, or movie or periodical to be judged separately in every village, hamlet, town, county, city and state in the nation, the immediate result will be self-censorship and the sharp curtailment of books, magazines and motion pictures which treat sex in a manner which even borders on the controversial. The end result can only be a dramatic skrinkage of First Amendment protection. Neither publishers, nor producers, nor distributors, nor exhibitors, nor booksellers (some of which are chains of stores located throughout the nation), will find it economically feasible to publish, order, sell, exhibit or maintain inventories of such controversial works. Magazine publishers would find it impossible to guarantee minimum circulation, a prerequisite to fixing advertising rates. Such results would hardly be consistent with the declaration in *Miller* that

> "The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas the works represent. The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (—— U. S., at ——, 93 S.Ct., at 2620-21).

(d) ***A prior civil determination of obscenity is the minimum pre-requisite to meeting due process requirements.***

The Due Process clause of the Fourteenth Amendment requires that all criminal laws provide fair notice of "what the state commands or forbids." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939); *Connaly* v. *General Construction Co.*, 269 U.S. 385 (1926). The almost unavoidable vagueness of any standards in the obscenity area makes "fair notice" an impossibility with respect to any works with the possible exception of those involving blatantly hard core pornography and we have doubt even as to that exception. Nevertheless, this court has steadily maintained its position that the definition of obscenity must provide adequate notice of exactly what is prohibited from dissemination. *Rabe* v. *Washington*, 405 U.S. 313 (1972); *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676 (1968); *Winters* v. *New York*, 333 U.S. 507 (1948); *Paris Adult Theatre I*, v. *Slaton*, —— U.S. ——, (71-1051 June 21, 1973, Brennan J., dissenting). Yet, with all due respect to this court, no standards have been established which cast doubt on Mr. Justice Black's assertion that "no person, not even the most learned judge, much less a layman, is capable of knowing in advance of an ultimate decision of his particular case by this Court whether certain material comes within the area of obscenity . . . ." *Ginzburg* v. *United States*, 383 U.S., at 480-481 (dissenting opinion).

Therefore, we respectfully refer this Court to its own allusion to a possible remedy, contained in footnote 4 of the majority opinion in *Slaton, supra*, that,

> "This procedure would have even more merit if the exhibitor or purveyor could also test the issue of obscenity in a similar civil action prior to any exposure to criminal penalty. . . ." (—— U.S. ——, 93 S.Ct., at 2634.

Such a remedy was strongly recommended by The Commission on Obscenity and Pornography after it had concluded:

> "The criminal process should not ordinarily be invoked against persons who might have reasonably believed, in good faith, that the books or films they distributed were entitled to constitutional protection, for any threat of criminal sanctions might otherwise deter the free distribution of constitutionally protected material." Report of The Commission on Obscenity and Pornography (1970).

Perhaps Mr. Justice Douglas set forth the proposition most succinctly in his dissent in *Miller*, when he stated:

> "If a specific book, play, paper or motion picture has in a civil proceeding been condemned as obscene and a review of that finding has been completed, and thereafter a person publishes, shows or displays that particular book or film, then a vague law has been made specific. There would remain the underlying question whether the First Amendment allows an implied exception in the case of obscenity. I do not think it does and my views on the issue have been stated over and over again. But at least a criminal prosecution brought at that juncture would not violate the time honored void-for vagueness test."
>
> ". . . To send men to jail for violating standards they cannot understand, construe and apply is a monstrous thing to do in a nation dedicated to fair trials and due process." (—— U.S. ——, 93 S.Ct., at 2624-25).

We respectfully submit, in the face of inevitable ambiguities in the interpretation of any obscenity statute, that only a requirement of prior civil determination will avoid

the pitfalls of the "void for vagueness doctrine" which Mr. Justice Brennan appears to have concluded is a bar to any constitutionally valid conviction under an existing obscenity statute. *Paris Adult Theatre I* v. *Slaton*, — U.S. —, 93 S.Ct. 2628, n.9 (1973).

POINT II

A legislative body may make no law abridging freedom of speech or the press in the absence of a clear showing of danger to the public health, safety or welfare.

Since the Fourteenth Amendment makes First Amendment legislative restrictions equally applicable to state and federal legislatures, this Court should be wary of carving out an obscenity exception with respect to that part of our Constitution which is the foundation stone of the republic. We respectfully submit that any publication, play or movie, access to which is restricted to consenting adults, is protected by the First Amendment.

Amici write no brief for the benefit of smut peddlers or porno movie producers. We have no sympathy for those who would profit by preying on individuals attracted to depictions of sexual sadism, masochism, fetishes, or other perverted sexual practices. But how dare we make exceptions to First Amendment guarantees of Free Speech and Press unless it can be proven that the danger incurred by permitting such freedom is greater than the danger to which we are exposed by sanctioning its abridgement.

Free speech and press are certainly subject to restrictions in proper circumstances. Mr. Justice Holmes' "fire in a crowded theatre" aphorism illustrated the point well. It is axiomatic that the right of a prankster to cry "fire" in a theatre is outweighed by the rights of the theatre

occupants to their lives and safety. But unless and until it can be demonstrated that obscenity, when purveyed or exhibited to consenting adults, exposes the public to a greater danger than an obscenity exception to the rights of free speech and free press, we respectfully submit that this Court must resist any efforts to intrude upon such First Amendment rights which continue to insure the orderly social and political changes without which our republic could not have long endured.

The majority opinion of *Slaton, supra,* footnote 8, makes reference to the Hill-Link Minority Report of the Commission on Obscenity and Pornography which suggests "that there is at least an arguable correlation between obscene material and crime." It fails, however, to quote the primary conclusion of the majority report, concurred in by twelve members of the Commission, to the effect that,

> "Federal, state and local legislation prohibiting the sale, exhibition and distribution of sexual materials to consenting adults should be repealed. . . ."

and further to the effect that:

> "Empirical investigation thus supports the opinion of a substantial majority of persons professionally engaged in the treatment of deviancy, delinquency and anti-social behavior, that exposure to sexually explicit materials has no harmful causal role in these areas." The Report of The Commission on Obscenity and Pornography (1970 ed.), 57-61.

Only five commissioners dissented and one abstained.

Thus, taking into account the dangers implicit in carving out an obscenity exception to the First Amendment, the near impossibility of avoiding "void for vagueness" pit-

falls of any obscenity statute, and the lack of convincing evidence that the danger of permitting freedom to disseminate obscenity to consenting adults is greater than the dangers inherent in its abridgment, we respectfully request this Court to reconsider its decision in *Miller* and to overrule it.

CONCLUSION

Amici respectfully request that the conviction of appellant should be reversed and that this Court should reassess its holdings in *Miller* and its companion cases, paying particular attention to the need for a prior civil determination of obscenity before any defendant may legally be tried for the commission of a crime.

MAXWELL J. LILLIENSTEIN
Attorney for Amici
99 Park Avenue
New York, New York 10016

NEWMAN, RICH, KRINSLY, POSES,
KATZ, LILLIENSTEIN, Esqs.
Of Counsel

FULTON COUNTY

LEWIS R. SLATON
DISTRICT ATTORNEY-ATLANTA JUDICIAL CIRCUIT
THIRD FLOOR COURTHOUSE • ATLANTA, GEORGIA 30303

January 7, 1974

Mr. Michael Rodak
Clerk, U.S. Supreme Court
Office of the Clerk
Supreme Court Building
Washington, D.C. 20543

Re: Jenkins v. State
Number 73-557
Supreme Court of the
United States

Dear Mr. Rodak:

We are receiving requests under Rule 42(2) of the Court for consent to the filing of briefs amicus curiae by counsel for several groups.

Please file this letter to show that the State of Georgia consents to the filing of such briefs on behalf of any interested group or party.

Yours very truly,

Carter Goode

CG/dj

CC: Mr. Tench C. Coxe
Attorney at Law
1500 Candler Building
Atlanta, Georgia 30303

Exhibit "1"

(Letter of Carter Goode consenting to filing of brief *amicus curiae*)

Exhibit "2"

(Letter of consent of Tench C. Coxe consenting to filing of brief *amicus curiae*)

(See Opposite) ☞

January 11, 1974

Troutman, Sanders, Lockerman & Ashmore, Esqs.
1500 Candelar bldg.
Atlanta, Georgia 03303

Attention: Messrs. Coke and Schroder,

re: Billie Jenkins v. State of Georgia
Supreme Court of the United States
No. 73-557

Gentlemen:

We represent American Booksellers Association, Inc. which has been granted the right to prepare a brief as amicus curiae in support of the appellant's position in the above matter.

Due to the question of a possible conflict of interest, the attorneys formerly representing the American Booksellers Association, Inc. in this appeal, are no longer in a position to do so.

January 11, 1974

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1500 Candelar bldg.
Atlanta, Georgia 03303

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re: Billie Jenkins v. State of Georgia
Supreme Court of the United States
No. 73-557

Gentlemen:

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Due to the question of a possible conflict of interest, the attorneys formerly representing the American Booksellers Association, Inc. in this appeal, are no longer in a position to do so. We would appreciate it if you would indicate your consent to our appearance in behalf of American Booksellers Association, Inc. for the purpose of submitting a brief as amicus curiae in support of appellant's appeal from the affirmants of the Supreme Court of the State of Georgia of the conviction of Billie Jenkins, for exhibiting the motion picture "Carnal Knowledge" in the City of Albany, Georgia.

You may, if you wish, indicate your consent by signing the enclosed copy of this letter where indicated and returning same in the enclosed envelope.

We would greatly appreciate your prompt attention to this matter.

Yours truly,

NEWMAN, RICH, KRINSLY, POSES, KATZ
& LILLIENSTEIN

By: _____
Maxwell J. Lillienstein

MJL:RK
ENC.

CONSENTED TO:
TROUTMAN, SANDERS, LOCKERMAN & ASHMORE
By: Linda C. Coke

Exhibit "3"

(Letter of Clerk of Supreme Court reporting consent to filing briefs by *amici curiae*)

(See Opposite) ☞

OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

December 10, 1973

James Bouras, Esq.
522 Fifth Avenue
New York, New York 10036

RE: JENKINS v. GEORGIA, No. 73-557

Dear Mr. Bouras:

The Court today took the following action in the above case:

"The motion of the Authors League of America, Inc., for leave to file a brief, as amicus curiae, is granted.

"The motion of the National Association of Theatre Owners for leave to file a brief, as amicus curiae, is granted.

The motion of Association of American Publishers, Inc., et al., for leave to file a brief, as amici

SUPREME COURT OF THE UNITED STATES
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The motion of Association of American Publishers, Inc., et al., for leave to file a brief, as amici curiae, is granted.

"In this case probable jurisdiction is noted."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50.00, Rule 52(a), is due and payable.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By

(Mrs.) Helen K. Loughran
Assistant Clerk

Enclosures
cc: Carter Goode, Esq.